

Privy Council Appeal No. 6 of 1924.

Patna Appeal No. 57 of 1921.

Musammat Hira Bibi and others - - - - - *Appellants*

v.

Ram Hari Lal and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1925.

Present at the Hearing :

LORD ATKINSON.

LORD SHAW.

LORD DARLING.

[*Delivered by LORD DARLING.*]

This is an appeal from a judgment and decree, dated 10th June, 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage dated 17th August, 1906. It was pleaded by the defendants (appellants) that the mortgage bond is void by reason of its not being attested in accordance with the provisions of the Transfer of Property Act IV of 1882, Section 59.

The only important question upon this appeal is in regard to the appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

Hira Bibi is a purdanashin lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign

it. She was behind the purdah. Anant Prasad, her son, took this deed, and others, inside the purdah. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

Mr. Justice Das—with whose judgment Mr. Justice Adami agreed—put the case thus :—

“ If the matter were *res integra* I should doubt whether the admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in Section 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that Section 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by Section 59 of the Transfer of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by Section 59 of the Transfer of Property Act.”

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the appellant, Hira Bibi, had they not felt bound to follow earlier decisions of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lordships that this case is already concluded by authority. It is needless to do more than to call attention to them very briefly :—

Shamu Patter v. Abdul Kadir Ravathan and others, L.R. I.A., 39, p. 218, decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, Section 59, the persons signing as witnesses must be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington (in *Bryan v. White*, 2 Rob. Ecc., 315–317) : “ ‘ Attest ’ means the persons shall be present and see what passes,

and shall when required, bear witness to the facts." And they followed the decision of the House of Lords in *Burdett v. Spilsbury* (10 Cl. & F., 340) to the same effect.

The case of *Padarath v. Ram Nain Upadhia*, L.R. 42, I.A., 163, is in its material facts totally different from this one, and has, therefore, no bearing on the question here to be decided. But another case—*Ganga Pershad Singh v. Ishri Pershad Singh*, L.R., 45, I.A., 94—is in almost all particulars identical with this present one, and in that instance the mortgage deed was declared to be void as not being duly executed and attested.

These cases sufficiently confute the argument founded upon the words of Section 70 of The Indian Evidence Act, 1872, that—

"The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

Those words apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense, attested; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so.

Their Lordships are, therefore, of opinion that, as against the appellant Musammat Hira Bibi, the mortgage decrees of both the Courts below should be set aside with costs, and the suit dismissed as against her. With regard to the other appellants the decrees should stand.

The costs of Musammat Hira Bibi should be paid by the contesting respondents, but the other, and unsuccessful appellants, should pay the costs of such of the respondents who appeared. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MUSAMMAT HIRA BIBI AND OTHERS

v.

RAM HARI LAL AND OTHERS.

DELIVERED BY LORD DARLING.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.
1925.